In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 204

GEORGE CHRISOS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 8-14) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1961 (Pet. 15). The petition for a writ of certiorari was filed on July 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In this prosecution for a violation of the Mann Act, petitioner waived a jury trial. After the trial, at which the woman involved, a prostitute, had testified as a government witness and petitioner had denied her incriminating testimony, and before the trial judge had made his finding as to guilt, he received and examined a pre-sentence report relating to the woman, who had pleaded guilty to an unrelated charge in another case. The question is whether the judge's examination of this report in connection with the other case was improper and prejudicial to petitioner so as to disqualify the judge from proceeding further in petitioner's case.

RULE INVOLVED

Rule 32, F. R. Crim. P.:

> (a) *Sentence.* Sentence shall be imposed without unreasonable delay. * * *
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> * * * * *
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> (c) *Presentence Investigation.*
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> (1) *When made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of the sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
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> (2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant,

and such other information as may be required by the Court.

STATEMENT

Petitioner and a codefendant, Aristotle Gatzoulis, were charged with inducing a woman to go by interstate common carrier from East St. Louis, Illinois, to Terre Haute, Indiana, for the purpose of prostitution, in violation of 18 U.S.C. 2422 (R. 4). After waiving a jury trial, they were tried before the District Court for the Eastern District of Illinois, which acquitted Gatzoulis but found petitioner guilty and sentenced him to imprisonment for four years (R. 142, 173-174). The court of appeals affirmed (Pet. 8-14). The evidence may be summarized as follows:

The offense involved a sixteen year old girl, most frequently referred to in the evidence as "Joyce" (R. 23).[1] She had been a prostitute before any of the events hereafter described took place, and continued to work as such thereafter (R. 24, 28-29, 45). Early in 1959, she went to work as a barmaid for petitioner and Gatzoulis, who operated the Cleo Club in the East St. Louis area (R. 7-8).

In February 1959, Bernard Hausback, the manager of the Sandison Hotel in Terre Haute, Indiana, saw Joyce in the Alibi Lounge, also in the East St. Louis area. He asked the owner of the building occupied by the Alibi Lounge, Mrs. Giovando, if she had anybody working—meaning, as he put it, as a prostitute (R. 49, 51-52, 75-76). Mrs. Giovando testified that peti-

[1] The indictment named her as Denise Shayne Berry (R. 4). As a witness she gave her name as Denise Shayne Berry Stewart, stating that she had been married about a year previously, following which she immediately separated from her husband (R. 7, 22-23).

tioner told her about this time that Joyce was "a waitress at the Cleo" and was "looking for work" (R. 49-50). On a Sunday in March, Hausback was again at the Alibi Lounge, together with Jeanette Hartman, the owner of the Sandison Hotel in Terre Haute. Mrs. Giovando introduced petitioner to them, telling them that they were looking for a girl to work in Terre Haute (R. 54). Jeanette Hartman asked petitioner if he knew of anyone who was looking for work as a prostitute. He told her he would let her know if he heard of anyone (R. 64-68).

A few days after this meeting with Hausback and Jeanette Hartman at the Alibi Lounge (see R. 52, 64), petitioner talked with Joyce and told her she was going to Terre Haute and that she would work as a prostitute. He told her who would meet her and what arrangements had been made. Joyce had never previously had any contact with anybody in Terre Haute. Petitioner gave her thirty-five or forty dollars and drove her to East St. Louis, where she took a cab to St. Louis (R. 12-15, 20-21). This was the only money she had and she spent it on her train fare (R. 19). In the meantime, petitioner had Mrs. Giovando call Jeanette Hartman at the Sandison Hotel in Terre Haute and tell her that Joyce would be there at ten o'clock (R. 52-53, 66, 72).

Joyce went by train from St. Louis to Terre Haute, where she was met by Hausback. He took her to the hotel where she worked as a prostitute for about six weeks (R. 15-16, 62-63, 76). Part of her earnings she kept for herself, part went to Jeanette Hartman, and the balance went to petitioner (R. 17, 33). Petitioner had Mrs. Giovando make another call to Terre

Haute with respect to Joyce, approximately a week after she had left East St. Louis (R. 53). He and the co-defendant Gatzoulis visited Joyce in Terre Haute while she was there (R. 19).

Petitioner, testifying in his own behalf, stated that he first met Joyce at another establishment in November 1958, and that she asked to go to work for him as a prostitute (R. 111-112). Later, she came to the Cleo Club with a hard luck story and looked as though she had been struck. Petitioner felt sorry for her and let her stay around there for two or three days and gave her some money. Still later, she worked as a prostitute in Centralia and Quincy, Illinois (R. 81, 113-115). After that, she worked at Grace's Tavern in the East St. Louis area (R. 116). Petitioner recalled the meeting at the Alibi Lounge with Hausback and Jeanette Hartman. He testified that he told them that Joyce could go to work for them if she wanted to, but that he would not send her any place (R. 117). Subsequently, Joyce told him that she wanted to go to Terre Haute. He told her that if that was what she wanted "she would go alone" (R. 118-119). Petitioner further testified that he did not drive Joyce to East St. Louis or give her money for the trip, nor did he receive any of her earnings while she was in Terre Haute (R. 119-121).

At the conclusion of the testimony on February 11, 1960, counsel for defendants moved for a judgment of acquittal. In response to the court's question, counsel said he would like to file a brief. The court granted defendants fifteen days in which to file their brief, with the government to have ten days to answer and defendants to have five days thereafter to reply. No briefs

having been filed,[2] the court set the matter down for oral argument on May 3, 1960. On May 26, the court found petitioner guilty and the co-defendant Gatzoulis not guilty, filed a memorandum of findings of fact and conclusions of law, and directed a pre-sentence investigation as to petitioner (R. 141-142, 175-181).

Petitioner duly filed a motion for new trial (R. 143-144). One of the grounds was newly discovered evidence consisting of an affidavit of Joyce in question and answer form (R. 185-196). In this she stated that the thirty-five or forty dollars she received from petitioner was a personal loan and that he may not have known that she needed the money for the trip to Terre Haute, following which she said that petitioner knew why she needed it (R. 189). She learned about the "job" in Terre Haute from petitioner some days before she made the trip. He told her of the conversation he had had with the people operating the Sandison Hotel in Terre Haute, and she told petitioner to make the arrangements for the job (R. 191-192). Petitioner did make the arrangements "[t]o a certain extent" (R. 195). She was positive she paid him back the thirty-five or forty dollars (*ibid.*). "To the best of [her] memory" at the time she made the affidavit, it was Gatzoulis who drove her to East St. Louis (R. 194).

At the hearing on the motion for new trial on July 6, 1960, Joyce testified that she had told petitioner's counsel that morning she could not remember whether

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[2] The implication from the record that no briefs were filed (R. 2, 142) is substantiated by a letter from the United States Attorney, dated July 14, 1961, which states that no briefs were filed, but that petitioner's trial counsel, at the time of oral argument, filed a paper entitled "Webster's New International Dictionary Second Edition, Unabridged (1951)", in which the words persuade, induce, entice and coerce were defined. See R. 141.

petitioner or Gatzoulis gave her the money for the trip (R. 149). On cross examination, she testified that she believed that petitioner had given her the money, but she could not remember exactly. She thought Gatzoulis had taken her to the cab stand in East St. Louis, Illinois, but she could not be sure (R. 152). She "believed" she had a discussion with petitioner about driving her to St. Louis, Missouri, to take the train to Terre Haute. He declined to drive her because that would involve "crossing a State line." Instead, she was driven to East St. Louis, whence she took a cab to St. Louis (R. 153-154). Petitioner might have thought of the thirty-five or forty dollars as a loan; she testified that she "sarcastically said I'll pay you back." He never pressed her. She gave him her earnings in Terre Haute, "except [her] living expenses" (R. 162-163).

Another ground for the motion for a new trial was that, at the time the court considered the evidence and made its finding of guilty, it had before it a pre-sentence report concerning Joyce which "might or could have unintentionally and unconsciously influenced this Court * * * particularly in considering and determining the weight to be given to [her] testimony" in this case (R. 184).[3] In arguing this point at the hearing, counsel stated that the report may have dealt with Joyce's activities as a prostitute in St. Louis before she went to the East St. Louis area. He said that petitioner had testified that Joyce had worked in a colored house of prostitution in St. Louis; that Joyce had denied this; and that if the pre-sentence report on Joyce adverted

[3] Shortly before the trial of the instant case, Joyce had pleaded guilty in the same court to a charge of interstate transportation of a forged check (R. 26-27, 151, 164-167).

to this matter it might have influenced the court to believe that petitioner, "at least on this point, was a liar on the background of the girl over at the hotel in St. Louis" (R. 164-165). The court pointed out that petitioner had testified that Joyce had told him that her husband had placed her in a colored house and that she had jumped out the window; that he was only repeating what Joyce had told him. The court stated that it was at a loss to understand why the report on Joyce should touch on this matter or how it could influence the court (R. 165-166).

The court took the motion under advisement until August 2, 1960, when it was denied and sentence was imposed upon petitioner (R. 169-174). In a memorandum opinion, the court pointed out that, as a witness on the motion for a new trial, Joyce "corroborated" her testimony at the trial and that, far from showing that her trial testimony was false or confused, her later testimony was "merely repetitious and cumulative." The court noted that although she testified at the trial that petitioner drove her to the cab stand in East St. Louis and later testified that she was not sure but thought that Gatzoulis drove her, the finding of guilty was based upon the whole series of acts. The court held that, even if it were to be assumed that Gatzoulis drove Joyce, "this would not have been sufficient to overcome other corroborated evidence presented at the trial" (R. 196-199).

ARGUMENT

Here, as in the court of appeals, petitioner makes no contention that the trial court's finding of guilty is unsupported by the evidence. His sole contention is that he was somehow prejudiced by reason of the fact that the trial judge had available a pre-sentence report on Joyce, in relation to another case, in the interim between the conclusion of the petitioner's trial on February 11, 1960, and the judge's decision on May 26, 1960, finding him guilty (Pet. 5-6).

In this connection, he asserts for the first time in this Court that the judge was remiss in failing to decide his case sooner and before he looked at the report on Joyce (Pet. 6-7). But the delay was largely attributable to the defendants' trial counsel, not the court. At the conclusion of the testimony on February 11, the court deferred decision on the issue of guilt at the defendants' request and gave counsel fifteen days to file a brief. No brief was filed, with the result that the court set the matter for oral argument. Argument was heard on May 3 and the court rendered its decision, accompanied by written findings of fact and conclusions of law, on May 26.

The court did not err in its handling of the other case, involving a charge that Joyce had transported interstate a forged check, to which she had pleaded guilty shortly before the instant case was tried. The court was required by Rule 32(a), F. R. Crim. P., *supra*, pp. 2-3, to impose sentence upon her without unreasonable delay and in performing this duty it was proper for the court to receive and examine the pre-sentence report of the probation service, in accordance with the provisions of Rule 32(c)(1). By obeying the prescriptions of the rule in the other case the court did

not violate it in this case. Petitioner points to that part of Rule 32(c)(1) which provides that a pre-sentence report shall not be submitted to the court prior to a plea or finding of guilty. But by its terms this provision obviously applies only to a pre-sentence report dealing with a defendant whose guilt has not yet been determined; it had no application, in petitioner's pending case, to the pre-sentence report dealing with Joyce in the separate and distinct case in which she had pleaded guilty. Neither has petitioner any cause to complain that he has never seen this report. A defendant has no right to see even a pre-sentence report on his own record and background. See *Williams* v. *New York*, 337 U.S. 241, 245.

Finally, petitioner's attempt to show prejudice is as unconvincing here as it was to the court of appeals (see Pet. 11). He argues that, since the trial court granted Joyce probation and since "her credibility was the principal issue at the trial," the report was "obviously" prejudicial to him (Pet. 5-6); that it must have dealt with the "facts of the instant case, that is [Joyce's] prostitution at Terre Haute"; and that it "very likely contained hearsay and other evidence inadmissible at the trial" (Pet. 6). This is sheer speculation. The trial court was at a loss to understand defendants' counsel's attempt to explain how the court might have been prejudiced by the report to believe Joyce and disbelieve petitioner and stated, in effect, that the report had had no influence on its decision finding petitioner guilty (see p. 8, *supra*). The present attempt to point out other possible ways in which the report may have prejudiced petitioner is equally unavailing. Furthermore, as the trial court pointed out in its memorandum opinion denying the

motion for a new trial, the issue of petitioner's guilt did not turn, as petitioner would have it, solely on the relative credibility of Joyce and petitioner, for her testimony was corroborated by other evidence (see, *e.g.*, the testimony of Mrs. Giovando summarized at pp. 3-5, *supra*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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